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DISTRICT II

December 11, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP976-CRNM State of Wisconsin v. Richard J. Smith (L.C. #2012CF373)

Before Brown, C.J., Reilly and Gundrum, JJ.

Richard Smith appeals from a judgment convicting him of felony bail jumping contrary to WIS. STAT. § 946.49(1)(b) (2011-12)[1] and from an order denying his postconviction motion. Smith's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Smith received a copy of the report and has filed a response. Upon consideration of the report, Smith's response and an independent review of the

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment and the order because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Smith's no contest plea was knowingly, voluntarily and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether the circuit court erred when it denied Smith's postconviction motion to withdraw his no contest plea. We agree with appellate counsel that these issues do not have arguable merit for appeal.

Postconviction, Smith sought to withdraw his no contest plea because the circuit court did not comply with its duty to "[e]stablish the defendant's understanding of the nature of the crime." ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794 (citation omitted). The State conceded that the plea colloquy was defective because the circuit court did not establish that Smith understood the elements of bail jumping. At the postconviction motion hearing, the circuit court found credible trial counsel's testimony that he informed Smith of the elements of bail jumping before the plea colloquy and Smith understood the elements of bail jumping at the time he pled no contest. The circuit court was charged with assessing the credibility of the witnesses at the postconviction motion hearing, *see* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345, and its findings of fact are not clearly erroneous based upon the postconviction record.

Aside from the defect in the plea colloquy addressed above, we conclude that Smith's no contest plea was properly entered. Smith answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that otherwise

complied with ***Hoppe***, 317 Wis. 2d 161, ¶18. The record discloses that Smith's no contest plea was knowingly, voluntarily and intelligently entered, *see* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, *see* ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Smith signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Smith's no contest plea.

In his response to counsel's no-merit report, Smith claims that there was no probable cause determination[2] and the criminal complaint did not establish probable cause. These issues were waived by the entry of Smith's no contest plea. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53 ("no contest plea waives all nonjurisdictional defects and defenses, including alleged constitutional violations occurring prior to the plea").

We also reject Smith's claim that he could not be convicted of count eight, felony bail jumping, without also being convicted of count one, strangulation. Count one was dismissed and read in. The elements of felony bail jumping are: Smith was released from custody on bond relating to a felony charge, and Smith intentionally failed to comply with the terms of his bond by

[2] The record contains a June 6, 2012 probable cause statement and judicial determination. Smith waived his preliminary examination.

committing a new crime, disorderly conduct. *See* WIS JI—CRIMINAL 1795. At the plea colloquy, Smith conceded that he was on bail for a Winnebago county felony drug charge when he committed the disorderly conduct offense in this case. Smith further agreed that the disorderly conduct charge formed the basis for his no contest plea to the felony bail jumping charge. This issue lacks arguable merit for appeal.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Smith to a six-year term. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In fashioning the sentence, the court considered the seriousness of the bail jumping offense, the offenses that were dismissed and read in (strangulation, two counts of felony bail jumping, and third-degree sexual assault), Smith's character, lengthy history of prior offenses and need for rehabilitation, Smith's previous failure on probation, and the need to protect the public. The court declared Smith ineligible for the Challenge Incarceration or similar programs. The sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

Smith complains that the circuit court referred to the dismissed and read-in charges at sentencing. As we held above, the court properly exercised its sentencing discretion, which included consideration of the dismissed and read-in charges. Furthermore, the court warned Smith during the plea colloquy that it could consider the dismissed and read-in charges at sentencing.

State v. Straszkowski, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835.[3] This issue lacks arguable merit for appeal.

Finally, Smith argues that his trial counsel was ineffective because he did not seek relief relating to the issues Smith raises in his response to counsel's no-merit report. We have held that the issues raised in Smith's response were either waived by Smith's plea or lack arguable merit for appeal. Therefore, we conclude that Smith's trial counsel was not ineffective. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel cannot be deemed ineffective for failing to pursue a claim that lacks merit).

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and the postconviction order and relieve Attorney Paul LaZotte of further representation of Smith in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[3] We note that the circuit court did not inform Smith that he could be required to pay restitution on any read-in charges and that the State is prohibited from future prosecution of a read-in charge. ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835. The circuit court did not impose restitution. We see no issue with arguable merit for appeal.

IT IS FURTHER ORDERED that Attorney Paul LaZotte is relieved of further representation of Richard Smith in this matter.

Diane M. Fremgen
Clerk of Court of Appeals